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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966.

No. 664

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

CHARLES SHORTER AND MAXINE SHORTER, ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

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THE BLAKELY-WARREN PRINTING COMPANY, CHICAGO

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT.

To the Honorable Earl Warren, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Petitioner, Indiana Lumbermens Mutual Insurance Company, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled cause.

CITATIONS TO OPINIONS BELOW.

The opinion of the District Court together with its Findings of Fact and Conclusions of Law (Record p. 38 *et seq.*) printed in Appendix A hereto *infra*, page 21, has not been reported in an official or unofficial report. The judgment order of the District Court (Record p. 40) is

printed in Appendix B hereto, *infra,* page 27. The District Court's Opinion and Order denying Petitioner's motion to amend findings of fact, conclusions of law and for the granting of a new trial (Record p. 46) is printed in Appendix C, *infra,* page 29.

The opinion of the United States Court of Appeals for the Sixth Circuit including the dissenting opinion of Judge Edwards (Record p. 50) printed in Appendix D hereto, *infra,* page 31, has not yet been reported in an official or unofficial report.

JURISDICTION.

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on April 29, 1966. Rehearing was denied on July 20, 1966. The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254, providing for review of decisions of the United States Court of Appeal by this Court.

QUESTIONS PRESENTED.

1. May a Court of Appeals ignore a question presented upon an appeal and by so doing refuse to enter an order which would compel the District Court to determine the proceedings before it in accordance with Rules 1, 8(d), 12 (h), 52 (a) and 81 (c) of the Federal Rules of Civil Procedure.

2. Is a party to litigation deprived of property without due process of law in violation of the Fifth Amendment of the United States Constitution when a Court of Appeal approves a judgment order of a District Court which judgment order was rendered without regard to Rules 1, 8 (d), 12 (h), 52 (a) and 81 (c) of the Federal Rules of Civil Procedure.

3. May a Court of Appeals refuse to determine questions of law specifically assigned as error on appeal in

violation of Title 28, United States Code, Section 46, which requires that "cases and controversies shall be heard and determined" by Courts of Appeals.

4. May a Court of Appeals deprive an appellant of property without due process of law by failing to make determinations of questions of law presented on appeal.

CONSTITUTIONAL AND STATUTORY PROVISIONS.

The following Constitutional and Statutory provisions are involved in this matter:

United States Constitution.

AMENDMENT 5.

"No person shall be . . . deprived of . . . property, without due process of law."

Title 28, U. S. Code.

COURTS OF APPEALS.

"¶ *46. Assignment of judges; divisions; hearings; quorum*

• • • • • •

(c) Cases and controversies shall be heard and determined by a court or division of not more than three judges, unless a hearing or rehearing before the court in banc is ordered by a majority of the circuit judges of the circuit who are in regular active service.

FEDERAL RULES OF CIVIL PROCEDURE.

Rule 1.

SCOPE OF RULES.

These rules govern the procedure in the United States district courts in all suits of a civil nature whether cognizable as cases at law or in equity, with the exceptions stated in Rule 81. They shall be construed to secure the just, speedy, and inexpensive determination of every action."

Rule 8.

GENERAL RULES OF PLEADING.

* * * * *

"(d) *Effect of Failure to Deny.* Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. . . ."

* * * * *

Rule 12.

DEFENSES AND OBJECTIONS—WHEN AND HOW PRESENTED —BY PLEADING OR MOTION—MOTION FOR JUDGMENT ON PLEADINGS.

* * * * *

"(h) *Waiver of Defenses.* A party waives all defenses and objections which he does not present either by motion as hereinbefore provided or, if he has made no motion, in his answer or reply, . . ."

Rule 52 (a).

"FINDINGS BY THE COURT.

(a) *Effect.* In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon . . ."

Rule 81.

APPLICABILITY IN GENERAL.

* * * * *

(c) *Removed Actions.* These rules apply to civil actions removed to the United States district courts from the state courts and govern procedure after removal. . . ."
Title 28, U. S. Code, Section 46.

STATEMENT.

This action was commenced in a State Court of Ohio and removed to the United States District Court for the Southern District of Ohio, Western Division, pursuant to Title 28, U. S. Code § 1441. (Record p. 1.) The amount in controversy at the time of removal was in excess of Ten Thousand Dollars ($10,000.00), exclusive of interest and costs, and there then existed a separate and independent controversy between plaintiffs, citizens of Ohio and Indiana Lumbermens Mutual Insurance Company, Petitioner, a citizen of Indiana, with its principal place of business in Indianapolis, Indiana.

The action commenced by plaintiffs was a declaratory judgment action in which plaintiffs sought to determine their rights as contract buyers and as insureds, respectively, under (1) a land contract for the purchase of a family residence, and (2) policies of insurance, for a fire loss which damaged the residence that was the subject of the land contract.

The parties to the litigation are identified below:

JAMES SHOUSE and YVONNE SHOUSE, plaintiffs (hereinafter referred to as "Plaintiffs"). Plaintiffs were purchasers of a residence under a land contract and were named as insureds in policies of insurance issued by the two defendant insurance companies. Plaintiffs were not obligated on the mortgage hereinafter referred to.

CHARLES SHORTER and MAXINE SHORTER, defendants (hereinafter referred to as "Mortgagors"). Mortgagors were the owners-sellers of the residence to Plaintiffs under the land contract and were obligated, as Mortgagors, on the mortgage for which the residence was given as security. The Mortgagors were named as co-insureds along with Plaintiffs in an insurance

policy issued by defendant, Security Insurance Company. Mortgagors were not named in Petitioner's policy of insurance.

LOSANTIVILLE BUILDING AND SAVINGS COMPANY, defendant (hereinafter referred to as "Mortgagee"). This defendant held the mortgage on the residence which was the subject of the land contract entered into by Plaintiffs and Mortgagors. Mortgagee was insured as a mortgagee, *not as a named insured,* under the provisions of standard mortgage clauses attached to and made a part of the policies of insurance which were sued upon.

SECURITY INSURANCE COMPANY, defendant (hereinafter referred to as "Security"). Security issued a policy of insurance protecting the residence which was the subject of the land contract against loss by fire. The policy issued by Security named, as co-insureds, Plaintiffs and Mortgagors. Mortgagee was protected under Security's policy under a standard mortgage clause.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, defendant Petitioner (hereinafter referred to as "Petitioner"). Petitioner, as did Security, issued a policy of insurance protecting the residence which was the subject of the land contract against loss by fire. The policy of Petitioner, however, named as insureds, Plaintiffs only. The Mortgagors were not named as insureds in Petitioner's policy. The policy issued by Petitioner, as did Security's, afforded the Mortgagee protection under the standard mortgage clause.

The destruction of the residence by loss by fire precipitated the Plaintiffs' declaratory judgment action.

For their respective answers to Plaintiffs' claims, all of defendants denied that there was any obligation owing from them to Plaintiffs.

After the joining of issues in the primary action, Mortgagee asserted a cross claim against Petitioner seeking to recover the amount of the mortgage debt from Petitioner, under the standard mortgage clause made a part of Petitioner's policy. (Record p. 21(3).) Petitioner denied liability to Mortgagee (Record p. 27) and with leave of Court first had and obtained (Record p. 26), filed a cross claim against Mortgagors alleging that if it was liable to Mortgagee, Petitioner was entitled to be subrogated to the interest of the Mortgagee against Mortgagors and recover from Mortgagors an amount equal to the sums it was required to pay Petitioner. (Record p. 27(3).)

Both the cross claims of Mortgagee against Petitioner and the cross claim of Petitioner against Mortgagors were predicated and founded upon the provisions of the standard mortgage clause attached to and made a part of Petitioner's policy of insurance. The standard mortgage clause which formed the basis for the Mortgagee's and Petitioner's cross claims provided in pertinent part:

> "Mortgage Clause: . . . Loss or damage, if any, under this policy, shall be payable to the mortgagee (or trustee), named on the first page of this policy, as interest may appear. . . .
>
> • • • • •
>
> "Whenever this company shall pay the mortgagee (or trustee) any sum for loss or damage under this policy, and shall claim that, as to the mortgagor or owner, no liability therefor existed, this company shall, to the extent of such payment, be thereupon legally subrogated to all the rights of the party to whom such payment shall be made, under all securities held as collateral to the mortgage debt, or may at its option pay to the mortgagee (or trustee) the whole principal due or to grow due on the mortgage, with interest accrued and shall thereupon receive a full assignment and transfer of the mortgage and of all such other securities . . ." (Record p. 27(3), p. 28 Ex. 2.)

Mortgagors never responded, by Motion, Answer or otherwise to the cross claim of Petitioner.

The claims of Plaintiffs against all defendants and the cross claims of defendants *inter se*, including Mortgagee's cross claim against Petitioner, and Petitioner's cross claim against Mortgagors were submitted to the District Court without a jury for resolution upon the pleadings, depositions on file, stipulations of fact, and certain documents. The District Court purporting to act, in accordance with the submission of the parties, on December 4, 1963, made findings of fact, rendered conclusions of law, filed a Memorandum Opinion and entered a Judgment Order (Record p. 38 *et seq.*, Appendix A, *infra* p. 21). The Judgment Order entered by the District Court, which the Court claimed was supported by its Memorandum Opinion, conclusions of law and findings of fact, provided *inter alia*:

(a) That plaintiffs were not entitled to recover under Petitioner's policy of insurance;

(b) That Mortgagee was entitled to recover from Petitioner the principal and interest due on its mortgage, and

(c) That upon Petitioner's satisfaction of the judgment entered against it in favor of the Mortgagee, the mortgage executed by Mortgagors should be cancelled by operation of the judgment order.

The District Court made *no findings* of fact, entered *no conclusions* of law, made *no reference* in its Memorandum Opinion, and entered *no judgment or order* on the cross claim of Petitioner against Mortgagors, notwithstanding that the allegations of Petitioner's cross claim were established by the record before the Court and were uncontroverted, unopposed and uncontested.[1]

1. A review of the record establishes also that the District Court never made findings of fact, rendered conclusions of law, or

Upon the filing of the findings of fact, conclusions of law, and Memorandum of Opinion and the entry of the Judgment order, Petitioner moved the District Court, pursuant to Title 28, U. S. Code, Federal Rules of Civil Procedure, Rule 52 (b) to amend and amplify its findings of fact. (Record p. 41.) At the same time, Petitioner also moved the District Court, pursuant to Title 28, U. S. Code, Federal Rules of Civil Procedure, Rule 59 to grant a new trial of all of the issues in this cause, or in the alternative, to alter or amend the Judgment which it had rendered. (Record p. 42.) A Memorandum Opinion and Order filed by the District Court on October 12, 1964 summarily denied Petitioner's post-trial motions. (Record p. 46, Appendix C, *infra*, p. 29.)

Obtaining no relief in the District Court, Petitioner prosecuted an appeal from the District Court Judgment Order to the United States Court of Appeals for the Sixth Circuit. On appeal, Petitioner complained of the failure of the District Court to grant the relief prayed for in Petitioner's cross claim, and the District Court's refusal to make findings of fact, enter conclusions of law and make determinations in accordance with the Federal Rules of Civil Procedure. (Appellant's Brief p. 14 *et seq.*; Appellant's Reply Brief p. 10 *et seq.*; 16 *et seq.*; 31 *et seq.*)

A majority of the Court of Appeals in a *per curiam* opinion filed April 29, 1966, adopted the opinion of the District Court and affirmed its findings of fact and conclusions of law. Judge Edwards of the Court filed a dissenting opinion. (Record p. 50, Appendix D, *infra*, p. 31.) No reference was made in either the majority or dissenting opinion filed in the Court of Appeals to the failure of the District Court to make determinations on the cross claim or to the cross claim itself, viz.: Petitioner's claim it was

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referred in its Judgment Order to a cross claim filed by the Mortgagors against Security by which cross claim the Mortgagors sought to recover as named insureds under the policy issued to them by Security.

entitled to be subrogated to the rights of Mortgagee against Mortgagors. In fact, nothing was said or has been said by either the District Court or the Court of Appeals which alludes to the merits or disposition of the unopposed cross claim of Petitioner.

Upon the rendition of the decision by the Court of Appeals, Petitioner requested a rehearing. The Petition for Rehearing asked the Court of Appeals to reconsider the appeal for, among other reasons, the majority of the Court in adopting the opinion of the District Court rendered a decision which failed to rule on an issue presented by the appeal, just as the District Court failed to grant the relief prayed for in Petitioner's unopposed cross claim against Mortgagors. (Petitioner for Rehearing, p. 8, *et seq.*)

The Petition for rehearing was denied by the Court of Appeals on July 20, 1966 without opinion.

REASONS FOR ALLOWANCE OF WRIT.

The appeal which has been brought to this Court presents issues concerned with the fundamentals of the administration of justice in the Federal System.

Initially, this Court must determine whether it will permit a District Court to disregard and ignore the Federal Rules of Civil Procedure. Secondly, there must be resolved the question whether the failure of the District Court to adhere to the Federal Rules of Civil Procedure resulted in the deprivation of Petitioner's property without due process of law. The third question present on this appeal is whether a Court of Appeals must decide questions of law presented on an appeal as required by statute. Lastly, there is submitted to this Court the question whether Petitioner was deprived of due process of law when the Court of Appeals refused to decide issues of law presented on the appeal.

1. It is clear that the District Court disregarded the Federal Rules of Civil Procedure in refusing to grant Petitioner the relief prayed for in its cross complaint. It is equally clear that the Court of Appeals ignored Petitioner's plea that it reverse the judgment order of the District Court so that the proceedings in the District Court would conform to and be in accordance with the Rules.

The cross complaint of Petitioner in the District Court, filed with leave of Court first had and obtained, was in the nature of an impleader, in that Petitioner sought to recover from Mortgagors sums which might be found owing by Petitioner to Mortgagee, which had cross claimed against Petitioner. Both Mortgagee's claim against Petitioner and Petitioner's cross claim against Mortgagors were predicated upon the standard mortgage clause which was a part of the policy of insurance issued by Petitioner. The standard mortgage clause expressly provided that Petitioner upon payment to the Mortgagee was entitled to be subrogated to the rights of the Mortgagee against the Mortgagor. (Page 7, *supra.*) By its cross claim Petitioner asked the District Court to enforce this contractual provision. (Record p. 27(3).)

Mortgagors never filed any response, answer, motion or other pleading, directed to Petitioner's cross claim.

The District Court found Petitioner liable to Mortgagee and thus established the essential element of Petitioner's cross claim against Mortgagors. In addition, it was established in the District Court that Petitioner was not liable to its named insured, Plaintiffs (Record 40) or to Mortgagors, who stipulated they had no claim under Petitioner's policy. (Record 28, ¶ 8.)

The sole substantive issue before the District Court which was governed by Ohio law was the viability of the subrogation provision contained in Petitioner's policy. The Ohio

Courts have *uniformly* held, as the District Court and Court of Appeals were advised, that the subrogation provision of the standard mortgage clause is valid and enforceable. *Wall* v. *Commercial Ins. Co.*, 7 O. Dec. Rep. 323; *Wall* v. *Amazon Ins. Co.*, 7 O. Dec. Rep. 408, aff'd. 31 O. S. 628, 27 Am. Rep. 533; *Merchants Ins. Co.* v. *Brown*, 16 O. C. C. N. S. 518, 35 O. C. C. 69; *Union Trust Co.* v. *Turansky*, 30 O. L. R. 308, 7 O. L. Abst. 473.

In the light of the foregoing, and especially Mortgagors—cross-defendants' admissions, and waiver of defenses, by failure to file responsive pleadings, there was no reason why the District Court should not have granted Petitioner the relief prayed for in its cross complaint. No reason for not allowing the relief prayed for in the cross complaint appears in the findings of fact, Conclusions of Law or Memorandum Opinion of the District Court or in the decision of the Court of Appeals. Both the judgment order of the District Court and its affirmance by the Court of Appeals can only be explained by a finding that the District Court chose to disregard and ignore the Federal Rules of Civil Procedure and was permitted to do so by the Court of Appeals.

The Federal Rules of Civil Procedure are to be applied "in all suits of a civil nature, whether cognizable as cases at law or in equity" (Rule 1) and in "civil actions removed to the United States District Courts from State Courts." (Rule 81(c).)

In giving meaning to Rules 1 and 81, Courts of Appeals, including the Sixth Circuit Court of Appeals, have stated without qualification that the Federal Rules of Civil Procedure have the force and effect of statute. *Rumsey* v. *George E. Failing Co.*, 333 F. 2d 960 (10th Cir.); *Nordmeyer* v. *Sanzone*, 315 F. 2d 780 (6th Cir.); *American Fed. of Musicians* v. *Stein*, 213 F. 2d 679, 686 (6th Cir.); *Bendix*

Aviation Corp. v. *Glass,* 195 F. 2d 267, 272 (3rd Cir.). District Courts amplifying these pronouncements have stated further that the Federal Rules of Civil Procedure are as binding on the District Courts as they are on counsel. *Barrezueta* v. *Sword S. S. Line,* 27 F. Supp. 935 (S. D. N. Y.); *Beasley* v. *United States,* 81 F. Supp. 518, 527 (E. D. S. C.); *Sieb's Hatcheries* v. *Lindley,* 13 F. D. R. 113, 119 (W. D. Ark.); *Westland Oil Co.* v. *Firestone Tire and Rubber Co.,* 3 F. R. D. 55, 56 (D. C. N. D.).

Notwithstanding Rules 1 and 81 (c) and the statements of the cited decisions, it is clear that *the District Court failed to adhere to or invoke Rule 8 (d), Rule 12 (h) and Rule 52 (a) of the Federal Rules of Civil Procedure.*

Rule 8 (d) states that averments in a pleading which are not denied stand admitted. The allegations of the cross claim were never traversed in any manner or form. They, therefore, stood admitted.

Rule 12 (h) states that all defenses and objections to pleadings are waived unless raised by motion or in the answer. No defenses or objections were interposed to the cross claim, therefore, all defenses and objections which might have been asserted were waived.

Rule 52 (a) requires the District Court in actions tried without a jury to "find the facts specially and state separately its conclusions of law thereon." The District Court, as concerns Petitioner's cross claim made no findings of fact and stated no conclusions of law.

The failure of the cross defendant Mortgagor to deny any of the allegations of the cross claim or to interpose any defenses thereto clearly entitled Petitioner to the relief which it sought. At the very least, the District Court was under an obligation to give findings of fact and state conclusions of law which would permit a "revelation" as to what the Court's "concept of the determining facts and

legal standard" may have been. *Commissioner* v. *Duberstein*, 363 U. S. 278, 292, 4 L. Ed. 2d 1218, 1229, 80 S. Ct. 1190.

By reason of the foregoing, Petitioner submits that if the Federal Rules of Civil Procedure mean what they say, and the courts in the Federal Judicial System have fairly interpreted their effect and the scope of their application this writ should be granted.

2. The failure of the District Court to render its judgment and conduct the proceedings before it in accordance with and pursuant to the Federal Rules of Civil Procedure has resulted in Petitioner being deprived of property without due process of law, in violation of the Fifth Amendment to the United States Constitution.

The property of which Petitioner has been deprived is the contractual and legal right to be subrogated to the interests of Mortgagee against Mortgagors, which subrogation would entitle Petitioner to recover from Mortgagor the amount of the judgment entered against Petitioner and in favor of Mortgagee.

The District Court's failure to conduct the proceedings before it in accordance with and pursuant to the Federal Rules of Civil Procedure is clear, *supra*, p. 13. It is equally clear that if the proceedings in a District Court were not in accordance with the Federal Rules of Civil Procedure, as in the instant case, the requirement of "due process of law" has not been satisfied.

As stated in *Endicott-Johnson Corp.* v. *Encyclopedia Press, Inc.*, 226 U. S. 285, 288, 69 L. Ed. 288, 292, 45 S. Ct. 61,

> "The words 'due process of law,' when applied to judicial proceedings, 'mean a course of legal proceedings *according to those rules and principles which have been established in our systems of jurisprudence for*

the protection and enforcement of private rights.' . . . (Citing cases.) They *require a proceeding which, observing the general rules thus established, follows forms of law appropriate to the case. . . .*" (Emphasis supplied.) 266 U. S. 285, 288, 69 L. Ed. 290, 292.

Pronouncements of equal force by this Court are found in *Scott* v. *McNeal*, 154 U. S. 34, 46, 38 L. ed. 896, 901, 14 Sup. Ct. Rep. 1108; *Ochoa y Hernandez* v. *Morales*, 230 U. S. 139, 161, 57 L. ed. 1427, 1437, 33 S. Ct. 1033; *Turpin* v. *Lemon*, 187 U. S. 51, 60, 47 L. ed. 70, 75, 23 S. Ct. 20; *Pennoyer* v. *Neff*, 95 U. S. 714, 733, 24 L. ed. 565, 572.

Even the Sixth Circuit Court of Appeals has acknowledged that judicial proceedings must be in accordance with the established rules and principles of the Federal Courts. *Sexton* v. *Barry*, 233 F. 2d 220, 224 (6th Cir.).

The rules and principles which have been established in the Federal System of Jurisprudence for the protection and enforcement of private rights are set forth in the Judicial Code (Title 28, U. S. Code) and the Federal Rules of Civil Procedure. A proceeding inconsistent with the Federal Rules of Civil Procedure, and one which disregards these Rules should not have received the approbation of the Court of Appeals. Nor should this Court by its silence condone the irregular proceedings below.

3. One of the two questions assigned as errors on appeal to the Sixth Circuit Court of Appeals was the following:

"II.

When a fire insurance policy affords coverage to a mortgagee under a standard mortgage clause providing that if the insurer should not be liable to the mortgagor, the insurer, upon payment to the mortgagee, should be legally subrogated to all the rights of the mortgagee under all securities held as collateral to the mortgage debt, is the insurer entitled to be subrogated to the interests of the mortgagee (upon payment

to it), against the mortgagors under all securities held as collateral for the mortgage debt, when it is not liable to the mortgagors?

The lower Court failed to answer this question.

Appellant contends this question should be answered 'Yes.'"

The Court of Appeals passed upon the first question raised on appeal, the resolution of which is not before this Court. The Court of Appeals, however, refused to determine the second controversy raised on appeal, which controversy was presented by the question set forth above.

The refusal of the Court of Appeals to determine one of the two controversies of law presented on Appeal was in disregard and violation of Title 28 U. S. Code ¶ 46 (c) which requires that "cases and controversies shall be heard and determined by Courts of Appeal."

The direction of the statute that controversies presented to Courts of Appeal shall be "heard and determined," is a clear mandate to the Courts of Appeal to decide controversies presented on an appeal. *N. L. R. B.* v. *Radio & Television Broadcasting Eng. Union*, 364 U. S. 573, 579, 5 L. Ed. 2d 302, 307, 81 S. Ct. 330. In the cited case this Court construing a similar phase stated:

> "The words 'hear and determine the dispute, convey not only the idea of hearing but also the idea of *deciding a controversy.*" (Emphasis supplied.) 364 U. S. 573, 579, 5 L. Ed. 2d 302, 307 81 S. Ct. 330.

As is manifest from the foregoing the Court of Appeals was asked to determine whether the cross claim of Petitioner should be enforced. (Appellant's Brief p. 14 *et seq.*; Appellant's Reply Brief p. 10 *et seq.*, p. 16 *et seq.*, p. 31 *et seq.*) The Court of Appeals heard the controversy which was considered at length in the briefs of the parties and argued upon oral argument, but it refused to determine

this controversy. A search of the record in the Court of Appeals to ascertain if the Court ever considered the issue would be futile, for the Court never alludes to Petitioner's cross claim.

This omission on the part of the Court of Appeals can be explained, but surely is not warranted by the District Court's non-compliance with Rule 52 (a) i.e., the District Court's refusal to set forth findings of fact and conclusions of law. At the very least, the Court of Appeals should have required the District Court to render such findings as would permit adequate judicial review. *Commissioner* v. *Duberstein*, 363 U. S. 278, 292, 4 L. Ed. 2d 1218, 1229, 80 S. Ct. 1190.

It is the position of Petitioner that the refusal of the Court of Appeals to determine the issue raised on appeal concerning Petitioner's cross claim against Mortgagors was a transgression of the statutory mandate, that controversies in Courts of Appeals should be "determined." Title 28 U. S. Code ¶ 46 (c).

4. The Court of Appeals' failure to determine the controversy presented on appeal was in derogation of the Fifth Amendment of the United States Constitution in that it deprived Petitioner of property without due process of law.

What has been stated above under point 2 (*supra*, pp. 14, 15) with regard to Petitioner's being deprived of due process by the proceedings in the District Court is equally applicable to the conduct of the Court of Appeals in failing to rule on the question of law presented on the appeal.

The established rules and principles which govern appellate review by a Court of Appeals requires that a controversy presented on appeal be "determined." 28 U. S. Code ¶ 46(c). Failure to determine the controversy presented on appeal is manifestly therefore not in accordance with established rules and procedures which govern appellate review.

In addition to the above, the refusal of the Court of Appeals to determine the question of law concerning Petitioner's cross claim deprived Petitioner of its right to a fair hearing. The right to a fair hearing is unquestionably within the concept of "due process of law." (Two recent decisions of this Court affirming the right to a fair hearing are *Armstrong* v. *Manz,* 380 U. S. 545, 552, 14 L. Ed. 2d 62, 66, 75 S. Ct. 1187; *Holt* v. *Virginia,* 381 U. S. 131, 136, 14 L. Ed. 2d 290, 293, 294, 85 S. Ct. 1375.)

Petitioner submits that *the right to be heard is of no consequence in the Federal Judicial System, if as in the case at bar, what is heard is not duly regarded, considered or determined by the Court of Appeals.* The record wholly fails to disclose any regard, consideration or determination by the Court of Appeals of the assignment of errors pertaining to Petitioner's cross claim.

Also implicit in the concept of due process is the right to a judicial review of questions of law, where as in the instant case Petitioner was deprived of due process in the tribunal of first instance. (Ohio ex rel. *Bryant* v. *Akron Metrop. Pk. Dist.,* 281 U. S. 74, 80, 74 L. Ed. 710, 715, 50 S. Ct. 228.) A search of the record discloses the absence of review or determinations by the Court of Appeals on any aspect, factual or legal of Petitioner's cross claim.

The conduct of the Court of Appeals in failing to grant to Petitioner a full hearing including judicial review in accordance with statutory mandate in and of itself, warrants the issuance of the Writ prayed for. Similarly, Federal procedure requires Appellate review in civil cases. Appellate review is accordingly a requisite of "process of law" in the Federal Judicial System, which requisite if not satisfied, deprives a litigant of due process. *Cole* v. *Arkansas,* 333 U. S. 196, 201, 202, 92 L. Ed. 644, 647, 648, 68 S. Ct. 514; *Frank* v. *Mangum,* 237 U. S. 309, 327, 59 L. Ed. 969, 980, 35 S. Ct. 582.

Extensive examination of decisions of this Court has failed to disclose an instance where this Court has defined the obligations of Courts of Appeal to "hear and determine" controversies, or what constitutes due process in civil appeals. If Courts of Appeals *are permitted* to ignore cases and controversies presented on appeal this Court should so state. If Courts of Appeals *are not permitted* to ignore cases and controversies presented on appeal this petition should be allowed.

CONCLUSION.

Petitioner is at a loss to explain the conduct of the District Court or the Court of Appeals in refusing to grant or even pass upon its cross claim. By any standard of procedure employed in the Federal Courts, the District Court and the Court of Appeals were both required to allow the cross claim. They did not do so and their reasons for not doing so and for not considering the claim, cannot be ascertained. The omissions in failing to state findings of fact and conclusions of law, standing alone, mock the Rules prescribed by this Court, and the Judicial Code.

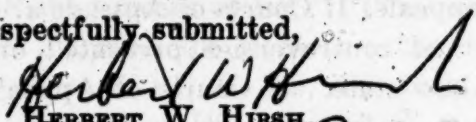
Petitioner respectfully submits that the procedures employed by both of the Courts below were so highly irregular that they constitute an embarrassment to the Federal Judiciary.

If Federal Courts, as in this case, are permitted to ignore claims and defenses in civil suits, a precedent of magnitude and frightening potential will have been established, not only in civil litigation, but in criminal matters as well.

This Court should allow this Petition for Writ of Certiorari. To do otherwise, it is submitted, would be to grant license to the District Courts and Courts of Appeals to abandon those rules and procedures which are the touchstones of the administration of justice in the Federal Sys-

tem. Surely, and at the very least, "there must be further proceedings in the District Court looking toward new and adequate findings of fact." *Commissioner* v. *Duberstein*, 363 U. S. 278, 292, 4 L. ed. 2d 1218, 1229, 80 S. Ct. 1190.

Respectfully submitted,



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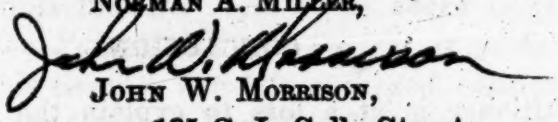

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APPENDIX A.

IN THE UNITED STATES DISTRICT COURT,

Southern District of Ohio,

Western Division.

JAMES SHOUSE, ET AL.,
Plaintiffs,
vs.
INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, ET AL.,
Defendants.

Civil Action No. 4646.

MEMORANDUM OPINION, FINDINGS OF FACT AND CONCLUSIONS OF LAW.

MEMORANDUM OPINION.

(Filed December 4, 1963.)

The complex factual pattern here presented involves controversy after destruction of the subject premises by fire between the sellers and buyers thereof by land purchase agreement, two insurance carriers, and the mortgagee. The basic question is whether either of the policies issued by the two insurers was in force and effect at the time of the fire.

As more fully appears from Findings of Fact filed contemporaneously herewith the plaintiffs Shouse contracted to purchase the residence property involved from the defendants Shorter and it thereby became the plaintiffs' ob-

ligation to keep the subject premises insured against fire and extended coverage. Pursuant thereto, a homeowners policy (covering among other perils a loss by fire) was issued by the defendant, Security Insurance Company of New Haven (hereinafter referred to as Security). Thereafter, apparently having become possessed of personal dissatisfactions with Security, plaintiffs took out a similar policy with the defendant Indiana Lumbermens Mutual Insurance Company (hereinafter referred to as Lumbermens). At this time the plaintiffs informed a Lumbermens agent of the existence of the Security policy and of their intention to cancel it. The original of the Lumbermens policy was sent to Losantiville Building and Savings Company (hereinafter referred to as Losantiville), which regarded it as a replacement for the Security policy. It further appears that all parties except Security were advised of the new policy, but none made any attempt to notify Security to cancel its policy (probably because not only would no refund be forthcoming because the premium remained unpaid, but a payment to cover the period of the policy's effectiveness would be required). As indicated in the Conclusions of Law also filed contemporaneously herewith, it is concluded that the procurement of additional insurance by the plaintiffs increased the hazard as a matter of law and rendered the Security policy void. See Ohio Jurisprudence 2nd 488 (Sec. 545) et seq. and cases cited therein.

Lumbermens' primary contention is that there was a wilful concealment or misrepresentation of circumstances by the plaintiffs as to their limited interest in the property and of the existence of other insurance in violation of the express provisions of the policy, and that the policy was therefore void ab initio. A reading of the depositions indicates that the plaintiffs were people of limited education who tended to rely on the agents of the insurance

companies or on the lending institutions to take care of procedural details and that the sellers and buyers had as their only concern a desire for protection against destruction of the subject premises. The failure of the Shouses to volunteer all of the particulars of their contractual relationship with the Shorters does not rise to the height of wilful concealment or misrepresentation. On the contrary, it seems that it may be more accurately concluded that the reason for the failure of all concerned to notify Security to cancel the policy was a very simple one; as indicated above, no one stood to benefit by the giving of such notice, and someone stood to be charged for protection afforded during a past period. It is parenthetically noted that the Shouse-Shorter land contract was recorded and that public notice of the interest of the parties was thereby established.

Concluding, as we do in accordance with the foregoing that at the time of the fire the Lumbermens policy was in effect, we come to a consideration of Lumbermens' final defense. Its policy provides that a proof of loss statement be submitted within sixty days of the loss, and it is conceded that such proof was not so filed. This constitutes a failure to comply, substantially or otherwise, with a condition precedent to recovery. *The Home Insurance Co.* v. *James Lindsey*, 26 Ohio St. 348 (1875); *Krasny* v. *Metropolitan Life Ins. Co.*, 143 Ohio St. 284 (1944); 45 *C. J. S.*, Insurance, Secs. 1006, et seq. It is also clear that the claim was not denied by Lumbermens within the sixty-day period, and thus there was no waiver by it of this provision of the policy. *Metz* v. *Buckeye Union Fire Ins. Co.*, 104 Ohio App. 93 (1957). Plaintiffs Shouse are therefore precluded from recovery under the policy.

While it is clear that plaintiffs have forfeited their right to recovery, it is equally clear that the rights of defendant Losantiville Building and Savings Company, the mortgagee named in the Lumbermens policy, were not abrogated by

the failure of the plaintiffs to file a proof of loss within the prescribed period. See 45 *C. J. S.*, Insurance, Section 1007c. See also, *Ohio Farmers Ins. Co.* v. *Hull*, 45 Ohio App. 166 (1932).

A properly endorsed entry consistent with this opinion and the accompanying Findings of Fact and Conclusions of Law and reflecting the amount of damages to be recovered by the Losantiville Building and Savings Company from Indiana Lumbermens Mutual Insurance Company may be presented.

Findings of Fact and Conclusions of Law.

(Filed December 4, 1963.)

Findings of Fact.

1. At the plaintiffs' request and with the knowledge of defendants Charles and Maxine Shorter, the Security Insurance Company of New Haven policy of insurance described in the complaint was issued and delivered to defendant Losantiville Building and Savings Company, and the premium therefor was paid by Charles Shorter on October 29, 1960.

2. Plaintiffs informed an agent of defendant Indiana Lumbermens Mutual Insurance Company of the existence of the Security policy and of plaintiffs' intention to cancel the Security policy.

3. Defendant Indiana Lumbermens knew that defendant Losantiville Building & Savings Company had an interest in the property located at 440 Strafer Street, Cincinnati, Ohio.

4. Plaintiffs Shouse failed to pay the taxes on the property subject to the land contract due and payable in December, 1960. Plaintiffs' last monthly $90.00 payment under

the land contract was made on December 15, 1960 and no payments have been made by plaintiffs since that date. Plaintiffs did not obtain approval of the defendants Shorter for the purchase of insurance from the defendant Indiana Lumbermens on the property subject to the land contract in September, 1960. On April 17, 1961, defendants Shorter gave plaintiffs notice by registered mail that defendants Shorter elected to consider land contract void by reason of failure to comply with its terms (Exhibit 5).

5. Defendant Maxine Shorter received an envelope from Losantiville which contained the Security policy (Exhibit 1) and a note which states: "Mr. Shorter, Mr. Shouse sent a new policy covering him on this property. Thought you would want to cancel this one. Losantiville B & S." (Exhibit 4.) She opened said envelope prior to the destruction of the subject premises and read the note but not the policy. She did not understand its significance and did not communicate said receipt to her husband, defendant Charles Shorter.

6. Parties agree that proper notice concerning the fire at 440 Strafer Street, Cincinnati, Ohio, was given by the plaintiffs to both insurance companies, but that written proofs of loss were never given by the plaintiffs to either insurance company.

7. Defendant Losantiville had knowledge of the existence of two policies of insurance covering the property at 440 Strafer Street, Cincinnati, Ohio, but did not notify either Security or Indiana Lumbermens of this fact.

8. No notification or request to cancel the Security policy was given to Security by anyone.

Conclusions of Law.

1. The procurement and issuance of additional insurance under the circumstances here found to exist rendered the policy of the Security Insurance Company of New Haven null and void as a matter of law.

2. The policy of the Indiana Lumbermens Mutual Insurance Company became legally effective on its stated date of inception, September 29, 1960.

3. The Indiana Lumbermens policy was in full force and effect at the time of the destruction of the premises.

4. The plaintiffs Shouse failed to file a written proof of loss in accordance with the provisions of the policy and thereby failed to comply with a condition precedent to recovery.

5. The rights of the defendant Losantiville Building & Savings Company, the mortgagee named in the Lumbermens' policy, were not abrogated by the failure of the plaintiffs Shouse to comply with such condition precedent and is entitled to recover under said policy.

APPENDIX B.

IN THE UNITED STATES DISTRICT COURT,

Southern District of Ohio,

Western Division.

JAMES SHOUSE, ET AL., *Plaintiffs,*

vs.

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, ET AL., *Defendants.*

Civil Action No. 4646.

ENTRY.

(Filed March 23, 1964.)

This cause came on to be determined by the Court without a jury, without the presentation of oral evidence or arguments by counsel, in accordance with stipulations of counsel filed herein. Said cause was submitted to the Court on the pleadings and an agreed statement of facts, supported by depositions, documents and briefs of counsel.

And the Court being duly advised in the premises in the manner above stated, does find upon the issues joined as stated in its Memorandum Opinion and its Findings of Fact and Conclusions of Law filed herein.

It is accordingly ordered that:

1. The claim of the plaintiffs, James Shouse and Yvonne Shouse, is denied and that neither the Security Insurance Company of New Haven, nor the Indiana

Lumbermens Mutual Insurance Company, are obligated to them.

2. The policy issued by the Security Insurance Company of New Haven is cancelled.

3. The policy issued by the Lumbermens Mutual insurance Company is binding upon said company to indemnify the cross-petitioning defendant, The Losantiville Building and Savings Company, the mortgagee in said policy, who was covered by the standard mortgage clause, to the full extent of its loan.

4. The building insured by the policy of Lumbermens Mutual Insurance Company, which was in effect at the time of the loss, was a complete loss; that while the policy covering said building was for Nine Thousand five hundred ($9,500.00) dollars, the loss sustained by the cross-petitioning defendant, The Losantiville Building and Savings Company, amounted to Eight thousand nine hundred six and 55/100 ($8,906.55) dollars. Interest on said amount totals One Thousand eight hundred six and 75/100 ($1,806.75) dollars as of February 17, 1964 and continues to accrue at the rate of One and 65/100 ($1.65) dollars a day. Judgment in said amount is awarded to the cross-petitioning defendant, The Losantiville Building and Savings Company, against the defendant, Indiana Lumbermens Mutual Insurance Company.

5. The existing contract to purchase between the plaintiffs, James Shouse and Yvonne Shouse, and the defendants, Charles Shorter and Maxine Shorter, is hereby cancelled and held for naught.

6. Upon the satisfaction of the judgment in favor of The Losantiville Building and Savings Company, its mortgage from Charles Shorter and Maxine Shorter, recorded in Volume 3082, page 699 of the Hamilton County, Ohio Mortgage Records, shall be cancelled by the operation of this decree.

7. The costs of this action are to be paid by The Indiana Lumbermens Mutual Insurance Company, to all of which the defendant, The Indiana Lumbermens Mutual Insurance Company, and the plaintiffs, James Shouse and Yvonne Shouse, except.

APPENDIX C.

IN THE UNITED STATES DISTRICT COURT,
Southern District of Ohio,
Western Division.

JAMES SHOUSE, ET AL., *Plaintiffs,* *vs.* INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY, ET AL., *Defendants.*	Civil Action No. 4646.

MEMORANDUM OPINION AND ORDER.

(Filed October 12, 1964.)

After protracted pretrial procedures this cause was submitted to the Court on the pleadings and an agreed statement of facts, depositions, documentary exhibits and many briefs of counsel. On December 4th, 1963, the Court filed its Findings of Fact and Conclusions of Law, and a Memorandum Opinion. The latter directed counsel to submit a "properly endorsed entry consistent with this opinion and the accompanying Findings of Fact and Conclusions of Law," but in spite of considerable prodding by the Court no such entry was submitted until March 23rd, 1964 on which date the entry was filed. Thereafter, defendant Indiana Lumbermens Mutual Insurance Company filed a

Motion For New Trial* And Amendmend of the Judgment Under Rule 59, and a Motion For Relief Under Rule 52(b). Thereafter additional chamber's conferences were held and by direction of the Court counsel conferred together privately in an effort to adjust their differences. On October 6th, 1964, all of counsel appeared in open court and formally advised that no adjustment was possible, and the matter was again taken under advisement.

After additional review of the record, including the extensive memoranda that have been filed, it has been determined that the findings and conclusions and Memorandum Opinion of December 4th, 1963, constitute adequate and accurate expressions. Accordingly,

IT IS ORDERED that the Motion of Defendant Indiana Lumbermens Mutual Insurance Company for Relief Under Rule 52(b) and its Motion For New Trial and Amendment of the Judgment Under Rule 59 should be and they are hereby denied, with exceptions of the movant.

/s/ JOHN W. PECK,
District Judge.

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* On April 2nd, 1964, plaintiffs also filed a motion for new trial. However, that motion was denied by order entered July 21st, 1964, and neither that motion nor its denial are presently under consideration.

APPENDIX D.

No. 16317.

UNITED STATES COURT OF APPEALS.

For the Sixth Circuit.

JAMES SHOUSE AND YVONNE SHOUSE,
Plaintiffs-Appellees,
v.
INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,
Defendant-Appellant,
SECURITY INSURANCE COMPANY OF NEW HAVEN,
Defendant-Appellee,
CHARLES SHORTER AND MAXINE SHORTER,
Defendant-Appellees,
and
LOSANTIVILLE BUILDING AND SAVINGS COMPANY,
Defendant-Appellee.

ON APPEAL from the District Court of the United States for the Southern District of Ohio, Western Division.

Decided April 29, 1966.

Before: EDWARDS, *Circuit Judge,* MCALLISTER, *Senior Circuit Judge,* and KENT, *District Judge.**

PER CURIAM. The above cause coming on to be heard on the briefs of the parties, the record, and the argument of

*Honorable W. Wallace Kent, Chief Judge, United States District Court for the Western District of Michigan, sitting by designation.

counsel, and the Court being duly advised; now therefore, it is adjudged and decreed that the judgment of the District Court be and is hereby affirmed on the findings of fact, conclusions of law, and opinion of Judge Peck, reported in ..... F. Supp. ....., (decided March 23, 1964).

EDWARDS, *Circuit Judge*, dissenting. This case was started by plaintiffs Shouses in a suit for declaratory judgment in state court against two insurance companies and the other defendants alleging total loss of a house and the personal property therein. It was removed to federal court on diversity of citizenship grounds. The insurance coverage in both policies as to the two items of loss claimed exceeded $10,000.

Appellant Indiana Lumbermens Mutual Insurance Company issued a fire insurance policy on a house being purchased by plaintiffs-appellees, Shouses. The land contract sellers (appellees, Shorters) had already insured the same house by a fire insurance policy issued by appellee, Security Insurance Company of New Haven.

Lumbermens had knowledge through the Shouses of the existence of the Security policy. Security had no knowledge of the Lumbermens' policy. Lumbermens did not give notice to Security. Both insurance policies had provisions against "other insurance."

The only claim under either insurance policy which is before this court in this appeal is that of appellee Losantiville Building and Savings Company, the mortgagee of the destroyed house. The mortgagee's interest had been insured under both insurance policies. Losantiville cross-claimed against both Lumbermens and Security for its loss.

Under Ohio law double coverage is held to create an additional risk and to warrant the voiding of a policy by an insurance company where the risk was thus increased without the insurer's knowledge and where the policy contained a provision against "other insurance." *The Phoenix In-*

surance Co. v. *The Michigan Southern & Northern Indiana Railroad Co.*, 28 Ohio St. 69 (1875); *Insurance Co.* v. *Holt*, 35 Ohio St. 189 (1878); *The Sun Fire Office of London* v. *Clark*, 53 Ohio St. 414 (1895); *New Jersey Insurance Co.* v. *Ball*, 119 Ohio St. 550 (1929).

Each insurance company asserts that its policy should be held invalid as to the mortgagee on the ground of double coverage.

The District Judge held the Security policy void on the ground of "other coverage" but held that appellant Lumbermens should pay the mortgagee—apparently on grounds of waiver—because its agent wrote the policy with full knowledge of the existence of the Security policy.

With much respect for the views of my colleagues and those of the District Judge, I come to the conclusion that this is not a true "double coverage" case and that neither insurance policy should be voided as a result of "other coverage."

The public policy behind the "double coverage" rule is founded on restraining persons from fraudulently insuring property in excess of its value so as to provide a financial motive for its willful or negligent destruction.

Patently we do not deal here with a situation involving any such facts.

Perhaps more important, the two policies of insurance at issue (while applicable to the same house) were issued to two different parties and insured different interests. Specifically, Security insured Losantiville for the Shorters' interest, while Lumbermens insured Losantiville for the Shouses' interest.

Couch on Insurance says:

> "Other or double insurance exists where two or more policies of insurance are effected upon or cover the same interest in the same, or part of the same,

property, against the same risk, and either in the name or for the benefit of the same person." 9 Couch, Insurance § 37:1292 (2d ed. 1962).

A text on Ohio insurance law says:

"The insurance of different interests although in the same property does not violate a condition against other insurance,[93] for the reason that the insurable interests involved under double insurance, must be identical.[94] Thus, where the possessors of separate interests in certain property obtain policies insuring their individual interests, neither insurance is avoidable for other insurance[95] . . ." McIntosh, Ohio Insurance Manual § 462 (1965).

"Fn. 93. *Roots* v. *Cincinnati Ins. Co.*, 12 Dec. Rep. 535, 1 Disn. 138; *Preferred Auto Ins. Co.* v. *Guthrie*, 21 OLA 617.

"Fn. 94. *National Ins. Co.* v. *Welbon Motor Car Co.*, 1 OLA 472.

"Fn. 95. *Bates* v. *Commercial Ins. Co.*, 13 Dec. Rep. 698, 1 CSCR 523, rev'd on other grounds in 13 Dec. Rep. 851, 2 CSCR 195."

See also *Farmers' Union Mutual Protective Association of Colorado* v. *San Luis State Bank*, 86 Colo. 293 (1929); Annot., 66 A. L. R. 1173 (1930).

Ohio has a law providing for apportionment of payment where there is more than one policy on the same property.

"When there are two or more insurance policies upon the same property, each policy shall contribute to the payment of the whole or of the partial loss in proportion to the amount of insurance mentioned in each policy. In no case shall the insurer be required to pay more than the amount mentioned in its policy." Ohio Rev. Code Anno. Title 39 § 3929.26 (1954).

Since Ohio law creates the substantive right of contribution, federal procedure favors disposing of the respective claims in a single suit. Rule 14 Fed. R. Civ. P.; *Worthington Corp.* v. *Lease Management, Inc.*, 352 F. 2d 24 (C. A.

6, 1965), cert. denied, ... U. S. ..... (1966) (March 7, 1966).

Judgment for the partial loss herein involved should have been rendered against both insurance companies "in proportion to the amount of insurance mentioned in each policy."

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No. 664

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

CHARLES SHORTER AND MAXINE SHORTER, et al.,

Respondents.

On Petition for a Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

---

BRIEF OF RESPONDENT, SECURITY INSURANCE COMPANY, IN OPPOSITION

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In The

Supreme Court of the United States

October Term, 1966

No. 664

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On Petition for a Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

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BRIEF OF RESPONDENT, SECURITY INSURANCE COMPANY, IN OPPOSITION

To the Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

QUESTIONS PRESENTED

1. Has a District Court ruled upon a party's claim to subrogation where the said party under Rule 52 (b), specifically moves the Court to so find and the District Court denies the entire motion without opinion?

2. Has a Court of Appeals, having before it the record containing the motion of a party moving the District Court

to find, as a matter of law, said party entitled to subrogation and the order of the District Court denying said motion, sufficiently reviewed and ruled upon said claim by affirming the judgment of the District Court without opinion?

3. Has a Court of Appeals erred in affirming a District Court's refusal to contravene the provisions of Rule 55 (a), (b) and (d) by entering a judgment in favor of a cross-complainant where a co-defendant against whom the relief is sought, fails or neglects to file an Answer and the cross-complainant neglects or refuses to follow the provisions of said Rule?

CONSTITUTIONAL AND STATUTORY PROVISIONS

FEDERAL RULES OF CIVIL PROCEDURE

RULE 52

FINDINGS BY THE COURT

"(a) Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 *or any other motion* (emphasis ours) except as provided in Rule 41 (b)."

RULE 55

DEFAULT

"(a) Entry. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

"(b) Judgment. Judgment by default may be entered as follows:

"(1) By the Clerk. When the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain, the clerk

upon request of the plaintiff and upon affidavit of the amount due shall enter judgment for that amount and costs against the defendant, if he has been defaulted for failure to appear and if he is not an infant or incompetent person.

"(2) By the Court. In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

"(d) Plaintiffs, Counterclaimants, Cross-Claimants. The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54 (c)."

ARGUMENT

This court must first decide whether or not there is any merit to petitioner's claim of being deprived of property without due process of law, the gravamen of the claim being the alleged failure of the District Court to rule on petitioner's claim to subrogation and the failure to enter judgment

on petitioner's cross-claim against the mortgagors (co-defendants).

If the District Court effectively disposed of the subrogation claim and correctly refused to enter judgment for the petitioner on its cross-claim then the Court of Appeals was obviously not in error in affirming the District Court; there was no denial of due process, and this Court must refuse the writ.

1. Examining petitioner's motion filed pursuant to Rule 52 (b). (Record p. 41), we find in paragraphs six and seven, at the top of page three, clear, concise and specific demands by motion upon the District Court to find, as a matter of law, petitioner's right to subrogation and, in paragraph seven, to find it entitled to judgment on its cross-claim against the mortgagors.

The District Court, in unequivocal language, denied the said claims, (Record p. 46, Petitioner's Appendix, p. 29).

It is difficult for this respondent to conceive, under the foregoing procedure, how or in what manner the District Court "failed," "refused," or "neglected" to rule upon the said claims of petition. It is clear under Rule 52 (a), Federal Rules of Civil Procedure, that the District Court need not make findings of fact or conclusions of law in deciding such a motion, nor, must it do so in deciding petitioner's motion under Rule 59, also denied (Record p. 46, Petitioner's Appendix C, p. 29).

Further, we think it worthy to note and respectfully direct this court's attention to the fact that the motion filed by the petitioner under Rule 52 (b) (Record p. 41), contained seventeen requests by the petitioner for amendments and amplifications of the District Court's previous findings of fact (Record p. 38 et seq., Petitioner's Appendix, A,

pages 24 and 25), and contained ten requests for amendments and amplifications of the District Court's conclusions of Law (Record p. 38 et seq., Petitioner's Appendix A, p. 26), all twenty-seven points ruled upon in exactly the same manner, yet petitioner complains of but two.

Thus, a clear decision was made by the District Court to petitioner's claim to a right of subrogation and its claim for a judgment on its cross-claim. Certainly, the merits of this decision are not before this court. The fact is that a ruling was made.

2. The Court of Appeals, in affirming the judgment of the District Court had before it the same motion containing the same demands and the same order of the District Court denying those demands. It is implicit that the District Court's judgment and the basis therefor was in fact reviewed and ruled upon by the Court of Appeals. (Record p. 50, Petitioner's Appendix D, p. 31).

The Court of Appeals committed no error in this or any other respect.

3. With reference to petitioner's claim as to its right for a judgment on its cross-claim, the District Court correctly and perceptively refused such judgment for to have done otherwise would have clearly contravened the provisions of Rule 55 (a), (b) and (d), Federal Rules of Civil Procedure.

The petitioner cannot now complain of its own failure to exert affirmative action in following the Federal Rule specifically provided in such situations.

The Court of Appeals, in refusing to reverse the District Court in the latter's correct interpretation as to the petitioner's course in obtaining its judgment, was not in error.

CONCLUSION

The facts in this case were complicated; the pleadings voluminous and the proceedings lengthy. The patience of the District Court with the petitioner as well as all of the parties was manifestly generous. It is regrettable that the petitioner, through its counsel, sees fit to characterize conduct of a United States District Court and a United States Court of Appeals in a manner hardly becoming one seeking redress before this tribunal.

This respondent genuinely believes that all of the proceedings in the District Court were proper under the Rules of Court and that the Court of Appeals was not in error in its affirmation thereof.

Respectfully submitted,

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No. 664

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1966

INDIANA LUMBERMENS MUTUAL INSURANCE COMPANY,

Petitioner,

vs.

CHARLES SHORTER AND MAXINE SHORTER, et al,

Respondents.

On Writ of Certiorari to The United States Court of Appeals for The Sixth Circuit

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BRIEF FOR RESPONDENT THE LOSANTIVILLE BUILDING AND SAVINGS COMPANY IN OPPOSITION

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QUESTION PRESENTED

Is this case one in which a Writ of Certiorari should issue to review the judgment of the United States Court of Appeals for the Sixth Circuit in the above entitled case?

STATEMENT

The petitioner sets forth in the last paragraph at the bottom of page 8 of its brief, the following:

> "The District Court made no findings of fact, entered no conclusions of law, made no reference in its Memorandum Opinion, and entered no judgment or order on the cross claim of Petitioner against Mortgagors,—notwithstanding that the allegations of Petitioner's cross claim were established by the record before the Court and were uncontroverted, unopposed and uncontested."

This statement should be augmented by saying that although the District Court made no specific findings, no specific conclusions, no specific references and no specific judgment or order as claimed by Petitioner in the aforementioned paragraph, the consideration of such findings, conclusions and references were inherent in the decisions and holdings and findings of the District Court and the Court of Appeals.

SUMMARY OF ARGUMENT

1. Petitioner's questions are not confined to distinct issues and questions of law.

2. This case and the issues presented are not of general importance.

ARGUMENT

Respondent, The Losantiville Building and Savings Company, hereinafter referred to as Mortgagee, submits this brief to summarily point out why the petition for a Writ of Certiorari should be denied:

1 (a) Petitioner's questions are not confined to distinct issues and questions of law. In its first two questions

(page 2 of Petitioner's Brief) it complains that the Court of Appeals ignored five (5) different Rules of the Federal Rules of Civil Procedure and approved a judgment order without regard to those same five (5) rules. Again, on page 10 of Petitioner's Brief, complaint is lodged as to said Court's ignoring, disregarding and failure to adhere to the Federal Rules of Civil Procedure. It was stated in *United States* v. *John Barth Company and United States Fidelity and Guaranty Company*, 276 U.S. 606, 72 L.Ed. 728, 48 SCR 337,

> "The questions certified in this case require in their answer a consideration of eight sections in the Revenue Acts of 1918 and 1921, 1924 and of 1926 and are not properly confined to any distinct question or proposition of law and need not be answered."

It was stated in Syllabus 1 of *White* v. *Johnson*, 282 U.S. 367, 75 L.Ed. 388, 51 SCR 115,

> "Upon certificate the Court will not answer questions of objectionable generality; and a question is improper which is so broad and indefinite as to admit of one answer under one set of circumstances and a different answer under another."

It thus appears Petitioner's questions encompassing the many Rules of Civil Procedure are too indistinct, broad and indefinite to support the issuance of a Writ of Certiorari.

(b) The *White* case also says, in Syllabus 3,:

> "The Court is not required to answer questions certified which are contingent upon an affirmative response to another question which it has declined to answer."

In view of this, it is important to note that Petitioner's claims that the District Court and the Court of Appeals ignored, disregarded and failed to respond to its allegations

on right of subrogation and assignment are not well founded. On the contrary, said Courts carefully considered them and found them wanting and did not directly or affirmatively respond to them; they are not now required to respond to them. Further, the parties required to determine the issues were at all times before the Courts, as were the pleadings of all the parties and the mortgage held by the Mortgagee. Also before the Courts was the agreed statement of facts, the depositions, the documents, the briefs and arguments of counsel. In view of all of this the Court specifically held:

> "6. Upon the satisfaction of the judgment in favor of The Losantiville Building and Savings Company, its mortgage from Charles Shorter and Maxine Shorter, recorded in Volume 3082, page 699, of the Hamilton County, Ohio Mortgage Records, shall be cancelled by the Operation of this decree." (See appendix B, page 28, paragraph 6 of Petitioner's Petition for Writ of Certiorari.)

It, therefore, appears that neither the District Court nor the Court of Appeals, refused to consider Petitioner's cross-claim, nor were ignorant of questions presented on appeal, nor refused to determine questions of law assigned as error on appeal, nor failed to make determinations of law presented on appeal with respect to Petitioner and its alleged right of subrogation and assignment. The District Court could not hold that Petitioner was entitled to be subrogated to Mortgagee's rights under the mortgage and receive assignment of the mortgage and at the same time cancel the mortgage. Accordingly the questions presented by the Petitioner were answered by the District Court and approved by the Court of Appeals, though perhaps not to the satisfaction of Petitioner.

2. Many cases have held that only questions of gravity and importance should be certified to the Supreme Court. A few of these cases are as follows:

Lau Ow Bew, Petitioner, 141 U.S. 583, 35 L.Ed. 868, 12 SCR 43, says in the first syllabus:

"Only questions of gravity, and importance should be certified to this Court by the Circuit Courts of Appeals, under the provisions of the Act of March 3, 1891, C. 517, Sec. 6."

In re Woods, Petitioner, 143 U.S. 202, 36 L.Ed. 125, 12 SCR 417, says in the Syllabus:

"The questions . . . (2) whether the law in respect of recovery by a servant against his master for injuries received in the course of his employment was properly applied on the trial of a case, does not fall within the category of questions of such gravity and general importance as to require the review of the conclusions of the Circuit Court of Appeals in reference to them."

Forsyth v. *Hammond,* 166 U.S. 506, 41 L.Ed. 1095, 17 SCR 665, says in the second syllabus:

"While this power is coextensive with all possible necessities, and sufficient to secure to this court a final control over litigation in all the Courts of Appeal, *it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy this Court that the importance of the question involved,* the necessity of avoiding conflict between two or more Courts of Appeal and the Courts of a State, or some matter affecting the interests of the Nation, in its internal or external relations, *demands such exercise.*" (Italics ours.)

In the case at bar the Petitioner has been ordered to pay this Respondent, The Losantiville Building and Savings Company, a judgment of approximately Nine thousand ($9,000.00) dollars, plus interest, pursuant to a con-

tract for the benefit of a third party. Likewise, the Court ordered the mortgage to be cancelled. The Court, thus, did not subrogate Petitioner to the rights of Mortgagee, or assign the mortgage to the Petitioner. The Petitioner now says this order is in error; that the Court of Appeals ignored questions presented on appeal and approved a judgment by the District Court. It alleges said judgment was rendered without regard to the Federal Rules of Civil Procedure in that it refused to determine questions of law specifically assigned as error on appeal. The essence of this is that Petitioner does not agree with the District Court and the Court of Appeals. Such a disagreement is not of sufficient gravity and general importance to sustain the position of the Petitioner.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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